ABILLAH LABO KHAN

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: D-05-33-1996]
1 APRIL 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Section 37(da) - Presumption of trafficking - Whether may only be invoked upon an express affirmative finding of possession under s. 37(d) - Dangerous Drugs Act 1952, ss. 37(d), (da), 39B*

CRIMINAL PROCEDURE: *Conviction - Validity of conviction - Misdirection of law - Whether conviction may be upheld despite misdirection - Whether only applicable to "exceptional cases" - Courts of Judicature Act 1964, s. 60(1)*

CRIMINAL PROCEDURE: *Judgment - Doctrine of retrospectivity - Whether applicable - Whether decision in Muhammed Hassan v. PP only applies prospectively*

This was the appellant's appeal against the learned trial judge's decision convicting and sentencing the appellant to death for trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 ('the Act'). The appellant contended that the learned trial judge had committed a serious misdirection as he had found the appellant to be in possession of the drugs by merely acting on the presumptions under s. 37(d) and (da) of the Act.

Held:
Per Gopal Sri Ram JCA

[1] To constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence, as per the case of *Muhammed Hassan v. PP*. In this instance, there was no such specific finding by the learned judge at the close of the prosecution's case in the terms required by s. 37(da) of the Act. (pp 524 g-i & 525 h)

[2] The Federal Court in *Tunde Apatira & Ors v. PP* made it clear that the proviso to s. 60(1) of the Courts of Judicature Act 1964 is to be applied only to "exceptional cases", where a conviction will be upheld despite a misdirection if the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The present case, however, was not exceptional, and would not have produced a conviction even in the absence of any misdirection. (p 526 c-d & h)

[3] The Federal Court did not declare its decision in *Muhammed Hassan v. PP* to be of prospective effect only. Therefore, the present case, although decided before *Muhammed Hassan v. PP*, would still be bound by the later decision under the general doctrine of retrospectivity. (p 528 e-f)

[Appeal allowed; conviction and death sentence under s. 39B of the Act substituted with conviction under s. 12(2) read with s. 39A(2) of the Act, and sentence of 18 years imprisonment together with ten strokes of rotan.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan perayu terhadap keputusan hakim yang bijaksana yang mensabitkan dan menjatuhkan hukuman mati terhadap perayu kerana mengedar dadah berbahaya di bawah s. 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'). Perayu menegaskan bahawa hakim perbicaraan yang bijaksana telah melakukan salah arahan yang serius kerana beliau telah mendapati perayu mempunyai dalam milikannya dadah berbahaya dengan hanya bertindak ke atas tanggapan-tanggapan di bawah s. 37(d) dan (da) Akta tersebut.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Untuk membentuk 'possession' di bawah s. 37(da) Akta tersebut, supaya dapat membentuk salah satu bahan di bawahnya yang dengan itu membangkitkan tanggapan mengedar, haruslah terdapat keputusan mengiakannya yang nyata (bertentangan dengan tanggungan sah) berhubung dengan pemilikan sepertimana yang difaham dalam undang-undang jenayah, berdasarkan keterangan, menurut kes *Muhammed Hassan v. PP*. Dalam hal ini, tidak terdapat keputusan khususnya yang sedemikian oleh hakim yang bijaksana ketika penutupan kes pihak pendakwaan menurut terma-terma yang diperlukan oleh s. 37(da) Akta tersebut.

[2] Mahkamah Persekutuan di dalam *Tunde Apatira & Ors v. PP* memperjelaskan bahawa peruntukan kepada s. 60(1) Akta Mahkamah Kehakiman 1964 haruslah dipakai hanya kepada "exceptional cases", di mana sesuatu pensabitan akan dipertahankan meskipun adanya salah-arahan jika mahkamah berpuashati bahawa suatu tribunal yang wajar mungkin telah mensabitkan tertuduh atas keterangan yang ada atas satu arahan yang sempurna. Kes semasa, namun begitu, tidak terkecuali, dan tidak mungkin akan menghasilkan satu pensabitan meskipun dalam ketiadaan sebarang salah-arahan.

[3] Mahkamah Persekutuan tidak mengisytiharkan keputusannya di dalam *Muhammed Hassan v. PP* sebagai mempunyai kesan yang prospektif sahaja. Oleh itu, kes semasa, meskipun diputuskan sebelum *Muhammed Hassan v. PP*, akan tetap terikat oleh keputusan kemudian di bawah doktrin am secara retrospektif.

[Rayuan dibenarkan; pensabitan dan hukuman mati di bawah s. 39B Akta tersebut digantikan dengan pensabitan di bawah s. 12(2) yang dibaca bersama s. 39A(2) Akta tersebut, dan hukuman pemenjaraan selama 18 tahun berserta dengan sepuluh kali sebatan rotan.]

Case(s) referred to:
Alcontara Ambross v. PP [1996] 1 CLJ 705 ***(foll)***
Choice Investments Ltd v. Jeromnimon [1981] 2 WLR 80 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 ***(refd)***
Jones v. Secretary of State for Social Services [1972] AC 944 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Linkletter v. Walker [1965] 381 US 618 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(foll)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 12(2), 37(d), (da), 39A(2), 39B

For the appellant - Karpal Singh (Gobind Singh Deo); M/s Karpal Singh & Co
For the respondent - Nurulhuda Nur'aini Mohamad Nor

[Appeal from High Court, Kota Bharu; Criminal Trial No: 45-6-1995]

Reported by Suresh Nathan

JUDGMENT
(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This appeal raises a short point. A point already traversed by high authority. It concerns the joint operation of ss. 37(d) and (da) of the Dangerous Drugs Act 1952 ("the Act").

The facts are simple enough. As long ago as 1 May 1994, at about 12.20pm the appellant was stopped at a roadblock at Nibong, Kampung Bendang Pak Yong, Kelantan. The appellant was riding a motorcycle. PW4, who was at the roadblock, having stopped the appellant escorted him to a wakaf, a place of rest for travellers. The appellant was searched. He was wearing a jacket zipped all the way up to the collar. He was asked to remove it. A body search by PW4 resulted in the recovery of a packet containing a white substance which on subsequent chemical examination was found to be heroin weighing 81.58 grams. The appellant was charged for an offence under s. 39B of the Act. He was convicted on that charge and the mandatory death sentence was passed on him. He now appeals.

The only ground advanced on his behalf by his counsel, Mr. Karpal Singh, is that the learned judge wrongly found the appellant to be in possession of the drugs, by merely acting on the presumptions under ss. 37(d) and (da) of the Act. In other words, the learned trial judge first found the appellant to have had custody and control of the drug in question. He accordingly, in terms of s. 37(d) of the Act, presumed that the appellant was in possession. Thereafter, the learned trial judge moved to s. 37(da) of the Act. Having found the appellant to be in possession, through the process of reasoning we have just described, the learned judge held the appellant to be a presumed trafficker since he was "found in possession" of more than the statutory minimum weight prescribed in that subsection. Counsel says this is a very significant point. It had persuaded the judge to find against the appellant as he mentions this twice in his judgment. Counsel complains that there was no specific finding by the learned judge at the close of the prosecution's case in the terms required by s. 37(da) of the Act. Put in a different fashion, the learned judge first must have held as a fact based on the evidence before him that the appellant indeed was "found in possession" of the drug. A careful reading of the judgment, counsel argues, shows that there was indeed no such finding made after the learned judge considered the evidence as it stood at the close of prosecution's case. This, counsel says, is a serious misdirection warranting the setting aside of the conviction under s. 39B and the substitution of a conviction for an offence under s. 12(2) read with s. 39A(2) of the Act.

In support of his argument, counsel has referred us to the judgment of a strongly constituted Federal Court in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170. That case has been cited to us often enough. Yet, its importance merits the reproduction of the relevant passage in the judgment of the learned Chief Justice of Sabah and Sarawak. This is how he put it:

> In our view, there is a clear undeniable distinction between the word 'deemed' used in s. 37(d) and the word 'found' employed in s. 37 (da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie, the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s. 37(da) connotes a finding after a trial by the court.
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> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the Act and those required to raise 'presumed … trafficking' under s. 37(da) are different. To come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.
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> In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

In responding to the appeal, Cik Nurulhuda deputy public prosecutor, while not contending that there has not been any misdirection, submits that we ought to apply the proviso to s. 60(1) of the Courts of Judicature Act 1964. In support of her argument, she relies on the judgment of the full bench of the Federal Court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 at p. 390:

> So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1966] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265 illustrates the exception.

Cik Nurulhuda who has argued against this appeal with much ability has skilfully sought to convince us that the evidence in the present case would have produced the same result even in the absence of the misdirection as in *Tunde*'s case. However, we are unable to agree with her argument. The Federal Court in *Tunde* made it clear that the proviso is to be applied only to an "exceptional case". Those are the words used. In *Tunde Apatira*, the circumstances were exceptional. We need not rehearse the facts of that case here. Suffice to say that the courts at all three levels in that case found the evidence overwhelming. Further, *Tunde Apatira* was a case where there had been concurrent finding of facts. The present case, in our view is covered by the following passage in the judgment of Edgar Joseph Jr. FCJ in *Alcontara a/l Ambross v. PP* [1996] 1 CLJ 705 in a passage drawn to the attention of the learned deputy by our learned brother, Alauddin bin Dato' Mohd Sheriff JCA in the course of the argument:

> Having said that, we would add there may well be cases where because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial court should, specifically, so find.

It is trite law that the burden of showing that the facts of a particular case are "overwhelming" (in the sense used in *Tunde Apatira* and the authorities therein cited) lies squarely on the shoulders of the prosecution. The learned deputy attempted, by reference to the evidence, to argue that this is an exceptional case. But we find nothing exceptional about it. The facts have been set out earlier. This case has no such features in the evidence as came across in such cases as in *Khoo Hi Chiang* for example.

There are two other submissions made by the learned deputy that require to be addressed. The first is her argument that the trial judge did in fact make a specific finding to the effect that the appellant was found in possession of the drugs in question. However, it is to be observed that this finding was made in the concluding passage of his judgment, after he had considered and dealt with the appellant's evidence in defence to the charge. That in our view is, with respect, wholly inadequate. The direction, if any, should have been administered by the trial judge unto himself when he was considering the evidence led by the prosecution. In other words, it should have been done at the close of the prosecution's case. So this submission of the learned deputy comes to nothing.

The second point raised by the learned deputy is that the present case was decided before *Muhammed bin Hassan (supra)*. With respect that again is no answer. It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect. In United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v. Walker* [1965] 381 US 618 (at p. 628). That principle has been adopted into our jurisprudence in *Public Prosecutor v. Dato' Yap Peng* [1987] 1 CLJ 550; ([1987] CLJ (Rep) 284) where, at p. 556 (p. 291), Abdoolcader SCJ said:

> The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v. Walker* [1965] 381 US 618 (at page 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *LC Golak Nath v. State of Punjab & Anor* AIR [1967] SC 1643 (at pages 1666-1669). The doctrine to the effect that when a statute is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the Court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed – can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it – to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

> In England this doctrine has been recognized by the House of Lords by necessary implication in the *Practice Statement (Judicial Precedent)* Vol 123 DLR (Third) 554 issued by Lord Gardiner L.C. on behalf of himself and the Lords of Appeal in Ordinary on July 26, 1966. More recently, in *Jones v. Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at page 1015) and Lord Simon of Glaisdale (at page 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v. Jeromnimon* [1981] 2WLR 80 Lord Denning M.R. in his judgment in the English Court of Appeal (at page 84) accepted the subsistence and application of the doctrine. In *Defrenne v. Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

Although *Linkletter v. Walker* and *Public Prosecutor v. Dato' Yap Peng* concerned the constitutionality of statutes, the same principle applies to decisions in other areas of the law. This appears sufficiently from the cases of *Jones v. Secretary of State for Social Services* [1972] AC 944 and *Choice Investments Ltd v. Jeromnimon* [1981] 2WLR 80 both of which are referred to in the passage above-quoted.

The Federal Court could, therefore, if it had so wished, have declared its decision in *Muhammed bin Hassan* to be of prospective effect only. Had it done so, then cases decided under the former misconception about the way in which ss. 37(d) and (da) of the Act were to be applied would not have been available for correction on appeal. But that is not what happened. The decision in *Muhammed bin Hassan* consequently falls under the general doctrine of retrospectivity and it therefore applies to the present case. We therefore are bound to apply it.

For the reasons we have given, we allow this appeal and set aside the conviction and sentence under s. 39B of the Act and substitute in its place a conviction under s. 12(2) read with s. 39A(2) of the Act.

Counsel for the appellant has cited to us the case of *Chow Kok Keong v. PP* [1998] 2 CLJ 469 where an accused found in possession of about 86 grams of heroine was sentenced to 18 years imprisonment and to ten strokes of rotan. But that was a case where there was no previous conviction. In this case, the appellant has two previous convictions, both of which concern drugs. The learned deputy urged us to impose a deterrent sentence.

Weighing all the considerations, including the gravity of the offence and public interest, we impose 18 years imprisonment and ten strokes of rotan. Before we conclude, we would like to express our appreciation to both counsel and the learned deputy for their assistance rendered to us during argument.